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DISTRICT OF COLUMBIA
TAX DIVISION

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Tax Division

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THE CHESAPEAKE & POTOMAC TELEPHONE COMPANY, Petitioner,	:	
v.	:	Tax Docket No. 3474-84
DISTRICT OF COLUMBIA, Respondent.	:	

O R D E R

This matter comes before the Court on Cross-Motions for Summary Judgment. Petitioner Chesapeake and Potomac Telephone Company ("C&P") appeals from a jeopardy assessment of tax, penalty and interest imposed by respondent District of Columbia for the tax periods January through May, 1984, measured by the petitioner's receipt of access charges from American Telephone and Telegraph ("AT&T") and other long distance carriers in the aggregate amount of $4,167,378.34. Petitioner seeks a refund of that amount, together with interest and penalty. Petitioner also seeks, a refund of taxes it paid for the assessment of June, 1984, and for monthly assessments since August, 1984.

Petitioner argues that these revenues, being access charges paid by the competing long distance carriers for local exchange service, are not subject to the District's gross receipts tax since they do not constitute the sale of a public utility commodity or service. Respondent, on the other hand, maintains that the subject revenues have been subject to the gross receipts tax since the date of its enactment.

This Court has jurisdiction to hear this matter pursuant to D.C. Code §11-1201 (1981 ed.).

I.

The material facts are not in dispute and may be briefly summarized:

1. Petitioner is a corporation duly organized under the laws of the state of New York. It is authorized to do business in the District of Columbia and maintains its business in the District of Columbia at its principal office located at 2055 L Street, N.W.

2. Respondent, through its Department of Finance and Revenue, administers D.C. Code §47-2501 (Supp. 1984).

3. Among petitioner's numerous activities, it provides telecommunications services within the District of Columbia. This activity has, for many years, included the provision of network access services and facilities to unaffiliated telecommunications common carrier companies such as Western Union Telegraph Company, MCI Telecommunications, Inc., GTE Sprint, and many others. Such telecommunications carriers use these services and facilities of petitioner to complete long distance telephone calls made by their customers.

4. From the date of enactment of the gross receipts tax now contained in D.C. Code §47-2501 (Supp. 1984) until 1984, respondent had never questioned petitioner's non-payment of tax on the revenues it received for the provision of network access services petitioner provided to unaffiliated telecommunications common carriers ("OCC's").

5. In fact, in 1978, in connection with a tax audit by respondent, petitioner clearly explained to respondent in writing that petitioner's tax returns reported the revenues received from the provision of network access services and facilities as non-taxable. Respondent in turn recognized the non-taxable status of revenues received from other carriers,

and in 1978 granted petitioner a refund for tax erroneously paid on such revenues.

6. Effective January 1, 1984, petitioner was divested from AT&T, and accordingly, as of that date, AT&T became an unaffiliated carrier.

7. On the January 1, 1984, divestiture date, petitioner began providing network access services to AT&T for which petitioner received network access revenues in payment from AT&T.

8. Petitioner's network access services are used by AT&T to complete long distance calls made by AT&T's customers.

9. These post-divestiture network access services provided to AT&T are the same services that are described in paragraphs 3 and 4 and that have been provided by petitioner to other unaffiliated telecommunications common carriers for many years.

10. Petitioner provided network access services to AT&T under contract from January, 1984, through May, 1984.

11. AT&T and the other telecommunications common carriers who use petitioner's facilities for the completion of long distance calls made by their customers do so because it is more economical and efficient for them to do so.

12. AT&T and the other carriers are not precluded from developing their own facilities for such services in a manner that would "by-pass" petitioner's local distribution facilities.

13. For the months of January, 1984, through June, 1984, petitioner timely filed, with the appropriate office of respondent's Department of Finance and Revenue, gross receipts tax return forms on which petitioner reported as

non-taxable the network access revenues it received from AT&T. Petitioner also reported as non-taxable on the returns the network access revenues it received from various other telecommunications common carriers. These returns identified petitioner's revenue in detail by accounts, as required by the forms, and clearly identified the revenues reported as non-taxable.

14. Petitioner did not include the cost of respondent's gross receipts tax when petitioner computed the rates which it currently charges other telecommunications common carriers for network access services.

15. In July, 1984, respondent assessed petitioner for $4,167,378.34 in additional gross receipts tax, penalty, and interest for the months of January, 1984, through May, 1984. Such assessment was based upon respondent's conclusion that network access revenues received from AT&T during those months were taxable in their entirety.

16. Respondent did not assess tax against revenues received by petitioner during the same period from carriers other than AT&T for the same services even though such revenues were also clearly reported as non-taxable on petitioner's monthly tax returns.

17. On August 27, 1984, petitioner paid respondent $4,666,124.76, representing the total of all amounts assessed by respondent for the periods January, 1984, through May, 1984, and an additional assessment for the month of June, 1984. This amount included penalty of $368,912.07 and interest of $109,345.41 imposed and ordered paid by respondent.

18. Since August, 1984, under protest but pursuant to the express direction of respondent, petitioner has been

paying gross receipts tax each month on the network access revenues at issue, resulting in the payment of additional gross receipts tax by petitioner of over $700,000.00 each month.

19. Petitioner clearly disclosed the non-taxable treatment of the network access revenues at issue on the face of each monthly return filed since January, 1984.

20. Petitioner requested waiver of penalty and interest in a letter to respondent dated July 19, 1984. Upon respondent's rejection of petitioner's request and arguments, petitioner paid tax, penalty, and interest, and now brings this appeal.

II. Defining the Gross Receipts Tax

A. Introduction

It is undisputed that petitioner is subject to gross receipts tax on revenues received from the sale of "public utility commodities and services within the District of Columbia." D.C. Code §47-2501 (Supp. 1984). However, the issue before the Court is whether petitioner's supplying of public utility commodities to other telecommunications carriers which those carriers, in turn, use to provide service to their customers is the furnishing of "public utility commodities" or "services" within the meaning of §47-2501.

Respondent argues that petitioner continues to hold a monopoly over all local service within the District and that it alone can lease out its exchange services to long-distance phone carriers, unfettered by competition, for a fee or tariff which is regulated. According to respondent, as long as petitioner holds this special position, it continues to meet the definition of a public utility, with its services subject to the District's gross receipts tax. Petitioner, on the other hand, argues that the telecommunications industry is a competitive one. It asserts that the revenues it receives for services it provides to other telecommunications common carriers ("OCC's") to service their customers more efficiently should not be taxed, but rather, respondent should more appropriately tax revenues the OCC's receive from their customers.

While the Court will not now decide whether the OCC's must bear the tax, the Court does determine that the network access revenues at issue are non-taxable under D.C. Code §47-2501 (Supp. 1984). The kind of services petitioner provides to another utility company in its field is not the public utility services contemplated by the statute, and the Court cannot now step outside its authority or jurisdiction to bring those access services within reach of the gross receipts tax.

B. <u>Common Law Definition of "Public Utility"</u>

The common law supports petitioner's argument that revenues it receives from network access services are non-taxable. In an earlier case factually similar to the present matter, the D.C. Tax Court (now this Court) held:

> [I]t is well settled that, if a public service company supplies services or facilities to another public service company in the same field, which in turn resells the services or facilities to the public, or if the services and facilities are for the sole use of the other company, they are not "public [utility] commodities or services."

<u>Chesapeake and Potomac Telephone Company v. District of Columbia</u>, Docket No. 1756 (D.C. Tax Court, July 17, 1962) at p. 12. On appeal, the Tax Court's conclusion was affirmed with the Court concluding:

> [W]hen a public service company supplies services or facilities to another public utility company in the same field for the sole purpose of enabling the latter company to serve its customers more efficiently, such services are not "public utility commodities or services" within the meaning of our statute, and thus are not subject to the gross receipts tax.

<u>Chesapeake and Potomac Telephone Company v. District of Columbia</u>, 325 F.2d 217, 222 (D.C. Cir. 1963). Thus the Court sustained the long-established practice of excluding from taxable gross receipts network access revenues received from unaffiliated telecommunications common carriers such as Western Union Company and Radio Corporation of America. <u>Id</u>. at 220, n.3.[1]

As in those earlier cases, so here, too, the petitioner supplies certain services to other telecommunications common carriers "in aid of the performance by the latter of telephone service to their own customers." <u>Id</u>. at 218. Like the companies in the earlier tax cases, these carriers, including AT&T, MCI, GTE Sprint, and others, use the access services provided by petitioner to complete the long distance calls made by the customers of those carriers. In the earlier tax cases, C&P aided its affiliates in Maryland and Virginia because of geographical convenience and to avoid unnecessary duplication of costs and services. Similarly the OCC's, while free to bypass petitioner's network and construct their own facilities to service their customers, have chosen, for reasons of efficiency and economy, to obtain access services from petitioner. <u>See, e.g., United States v. AT&T</u>, 552 F.Supp. 131, 157 (D.D.C. 1982).

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1 In another, more recent action directly on point regarding gross receipts taxation of access charges paid by AT&T, the Office of Attorney General of North Carolina advised that state's Secretary of Revenue that such revenues are not includable in a telephone company's public utility gross receipts. <u>See</u> Memorandum to Mark G. Lynch, Secretary of Revenue from Myron C. Banks, Special Deputy Attorney General (N.C. Dept. of Justice, March 30, 1984). Significantly the Ju7stice Department's opinion relied on <u>Chesapeake and Potomac Telephone Company v. District of Columbia</u>, 325 F.2d 217 (D.C. Cir. 1963) for support. The Department observed that "the Court distinguished the nature of the service rendered by one company to another in order to enable the latter company to serve its own customers from services rendered by a company to subscribers in fulfillment of its public utility obligations." Memorandum at 3. The Department then concluded, "here, similar considerations seem to apply, not as between competing jurisdictions but between companies." Id.

Accordingly, this Court concludes that the network access services at issue are used by other telecommunications common carriers to serve their customers more efficiently and economically, and that such services are clearly the same types of services as those provided to Western Union, RCA and others which were found non-taxable in C&P Telephone Co., 325 F.2d at 217.

C. Irrelevancy of Competition to Determine Taxability

Respondent further argues that AT&T and the other telecommunications common carriers using petitioner's services are not public utility companies because they are subject to competition. The Court rejects this view because "legislation has been upheld imposing stringent regulations of various types on entities found to be affected with a public character, even where nothing approaching monopoly power exists." National Association of Regulatory Utility Commissioners v. FCC, 525 F.2d 630, 641 (D.C. Cir.), cert. denied, 425 U.S. 992 (1976). Respondent also ignores the fact that competition for telephone equipment and interstate long distance service existed for many years prior to divestiture, yet such competition did not change the regulated public utility status of petitioner, AT&T or other telecommunications carriers.

Furthermore, petitioner itself continues to be subject to competition for many of its services, including short distance toll and Centrex. Even the services at issue in this case, network access services, are subject to competition because other carriers are free to bypass petitioner's facilities and connect directly to their customers.[2] Thus,

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2 See, e.g., New York Times, May 3, 1985, at D1 and D2 (which reported the decision of AT&T to bypass New York Telephone Company (petitioner's counterpart in the New York City area) and to provide service directly to a large AT&T customer rather than using the network access services of New York Telephone Company).

under respondent's own test for applicability of the gross receipts tax, most, if not all, of petitioner's business would be exempt.

This Court concludes that a focus on competition as the standard for determining taxability is incorrect. Instead, the relevant question is whether or not a service, like network access service, is provided to another telecommunications common carrier so that it can provide service to its customers more efficiently and economically. Where, as here, another common carrier uses petitioner's facilities to provide service to that carrier's customers, petitioner is not, for the reasons already given, providing "public utility commodities or services," and the revenue is therefore not subject to gross receipts tax.

III. Purpose of Gross Receipts Tax

Respondent argues that the legislative history of the gross receipts tax supports taxation of revenues petitioner received from its provision of network access services. Respondent points to the congressional effort behind the District of Columbia Revenue Act of 1939 to define public utilities and their unique, privileged position among businesses justifying taxation of their gross receipts. See District of Columbia Tax Study, House Doc. No. 108 (76th Cong., 1st Sess. (1939)). According to respondent, petitioner meets the definition of the monopolistic, regulated utility Congress intended to tax.

However, the Court is not convinced by respondent's argument. The telecommunications industry of today bears no resemblance to the public utility targeted for tax in 1939. When Congress drafted the 1939 Act, it was looking at a single, regulated monopoly which directly serviced its customers. By the time of the tax years in question, AT&T was divested of its subsidiaries, and the other telecommunications common carriers who entered the field were being regulated as well. See, e.g., Sixth Report and Order, FCC Docket No. 79-252, 50 Fed. Reg. 1215, 1218, 1221 (Jan. 10, 1985) (where the FCC imposed requirements on the carriers to "provide the Commission with adequate data in order to meet its statutory duty of ensuring that [such] carriers' rates are just and reasonable" and to "enable the carriers to meet their public interest obligations"). In addition, petitioner was, as it is now, providing service not merely directly to the public, but also to other common carriers in the network access service transaction the revenues from which are now in dispute. Thus Congress had not contemplated in 1939 the vast and complex telecommunications network system that would be in place by 1984. In short, the 1939 Act was not passed with network access service revenues in mind, and accordingly, its legislative history offers scant support.

If the legislative history can be relied upon at all, then it would be to reject, rather than support, the taxation of petitioner's gross receipts. The findings and recommendations of the Tax Study, which furnished the basis of the 1939 Act, contained this statement:

> Present gross earnings and gross receipts taxes on the four major public utilities should be supplanted by a gross-receipts tax based exclusively on the sale of public utility services or commodities within the District of Columbia, allowing no deduction for the cost of raw materials. Deductions . . . for sales other than those of public utility commodities or services would be allowed.

"Tax Study," (emphasis added) cited in C&P Telephone Co., 325 F.2d at 221. According to the C&P court, the legislative purpose, as articulated in the Tax Study, is to tax only once when a service is provided to the ultimate consumer and avoid double taxation on sales of services to other utilities which divested of its subsidiaries, and the other telecommunications common carriers who entered the field were being regulated as well. _See_, _e.g._, _Sixth Report and Order_, FCC Docket No. 79-252, 50 Fed. Reg. 1215, 1218, 1221 (Jan. 10, 1985) (where the FCC imposed requirements on the carriers to "provide the Commission with adequate data in order to meet its statutory duty of ensuring that [such] carriers' rates are just and reasonable" and to "enable the carriers to meet their public interest obligations"). In addition, petitioner was, as it is now, providing service not merely directly to the public, but also to other common carriers in the network access service transaction the revenues from which are now in dispute. Thus Congress had not contemplated in 1939 the vast and complex telecommunications network system that would be in place by 1984. In short, the 1939 Act was not passed with network access service revenues in mind, and accordingly, its legislative history offers scant support.

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"Tax Study," (emphasis added) cited in _C&P Telephone Co._, 325 F.2d at 221. According to the _C&P_ court, the legislative purpose, as articulated in the Tax Study, is to tax only once when a service is provided to the ultimate consumer and avoid double taxation on sales of services to other utilities which are then used to provide service to the ultimate consumer. *See* *C&P*, 325 F.2d at 221. Although the *C&P* court in 1963 was concerned with double taxation of pre-divestiture AT&T subsidiaries operating in two neighboring jurisdictions, this Court concludes the result should be no different when dealing with petitioner who also operated in conjunction with other carriers. The network access system functions similar to the services at issue in *C&P*. In each case, the petitioner supplied services to other telephone companies to assist them in their service to their own customers. These kinds of services have been held not to be "public utility commodities or services" within the meaning of the gross receipts statute. *C&P Telephone Co. v. District of Columbia*, Docket No. 1756, (D.C. Tax Court, July 17, 1962), *affirmed in relevant part*, 325 F.2d at 217 (D.C. Cir. 1963). The telephone companies having not been taxed in the past for revenues derived from assisting other carriers, and the legislative history, as interpreted by the common law, supporting this non-taxation, the Court determines the divestiture did not require that petitioner must now be taxed on revenues similarly derived from providing service to other telecommunications carriers.

IV. Distinguishing Direct Service to Customers from Access Service to Carriers

As the foregoing demonstrates, a guidepost to this Court's decision is the distinction the common law has drawn between petitioner's provision of access service to other telecommunications common carriers and the latter's direct service to their own customers. *See, e.g.*, *C&P*, 325 F.2d at 222. Since the enactment of the D.C. Revenue Act of 1939, the gross receipts tax has been applied to revenues from the direct, rather than the network access, service.

Since at least 1934, when Congress adopted the Communications Act of 1934, 48 Stat. 1064, and established the Federal Communications Commission ("FCC") with authority over foreign and interstate but not intrastate communication, the FCC has apportioned costs between interstate and intrastate carriers. See 47 C.F.R., Part 67. This Division of Revenue system prescribes accounting methods that artificially distribute the costs and revenues between the local and interstate carriers.

Respondent argues that the carrier access charges which petitioner receives from AT&T are subject to gross receipts tax because petitioner's pre-divestiture interstate revenues from interstate long distance calls were subject to the gross receipts tax. Respondent relies on Chesapeake and Potomac Telephone Co. v. District of Columbia, 137 F.2d 674 (D.C. Cir. 1943) for support. This Court concludes, however, that that case is founded on facts clearly different from those in the present matter.

In the 1943 case, petitioner was providing interstate long distance calling directly to its customers in the District, and not, as in the present case, to other common carriers who in turn provided service to their own customers. Those customers paid one single charge for the interstate call to petitioner. Petitioner in turn divided a portion of that revenue with its other partners in the interstate toll system in accordance with the Division of Revenue scheme, including AT&T, AT&T's other affiliates and independent telephone companies. Until the effective date of divestiture, January 1, 1984, petitioner paid gross receipts tax on its share of these interstate revenues, pursuant to the 1943 decision.

Prior to divestiture, interstate toll service was also provided by other common carriers such as Western Union, MCI Telecommunications, Inc., GTE Sprint and many others who were not part of the Division of Revenue process. See In the Matter of MTS and WATS Market Structure, 77 FCC 2d 224, 228-229 (1980). Petitioner was compensated for these services by means of a system of network access charges paid to it by those carriers. Adopted by the FCC in April, 1979, this system was called Exchange Network Facilities for Interstate Access ("ENFIA"). See, In the Matter of Exchange Network Facilities for Interstate Access (ENFIA) 71 FCC 2d 440 (1979). However, unlike the Division of Revenue charges, these network access revenues received by petitioner from these carriers for the use of petitioner's facilities to serve their customers were never treated by respondent as subject to the gross receipts tax. In fact, the revenues were not taxable because the services were provided by petitioner to those carriers and not to petitioner's own long distance customers.

With divestiture, effective January 1, 1984, the Division of Revenues System was terminated. See United States v. AT&T, 552 F.Supp. at 196, n.271. Petitioner could continue to receive ENFIA tariffs, but due to divestiture could no longer receive the Division of Revenues from AT&T. Until a new tariff was established, petitioner received revenues from AT&T pursuant to a private contract entered into by both companies. By June, 1984, the FCC had prescribed access charges for all telecommunications common carriers, including AT&T.

Although petitioner can still provide limited short distance interstate toll service upon which it pays gross receipts tax, under the present revenue system, petitioner can no longer provide long distance interstate toll service to its own customers. AT&T, on the other hand, can provide such long distance toll service to its customers, just like Western Union, MCI, GTE Sprint, and many others. Similar to the other telecommunications common carriers, AT&T uses petitioner's facilities to complete the long distance interstate toll calls of its customers. Moreover, unlike the Division of Revenue process, the customers for this long distance service are AT&T's customers, not petitioner's customers. AT&T uses petitioner's facilities to complete AT&T customers' long distance interstate toll calls when it is more efficient and economical than connecting AT&T's own long distance network directly to its own customers.

To summarize briefly, the Division of Revenue and network access charges were developed for two entirely different services. The former was applied to long distance telephone services provided by petitioner directly to its customers. The latter, first in the form of ENFIA, then later as FCC-prescribed charges for network access services from all telecommunications common carriers, was and is applied to the rendition of services of one public utility telecommunications carrier to another.

Respondent would have the Court conclude that the network access charges merely represent the Division of Revenue process under a different name. However, the Court concludes that the FCC's development of a system of access charges began in 1978 and continued over a period of years prior to divestiture in response to changing competitive conditions in the communications industry, and was not driven by the termination of the Division of Revenue process or other divestiture-related events. See, e.g., In the Matter of MTS and WATS

Market Structure, 67 FCC 2d 757 (1978). Although divestiture may have accelerated the implementation of network access charges as to AT&T, it was not the pivotal cause.[3]

V. Irrelevancy of Tariff Regulation

Respondent further argues that because revenues paid to petitioner by interstate exchange carriers are governed by tariff, the receipts from those revenues are taxable. However, the Court finds that the tariff status of common carrier revenues is not dispositive of the taxation issue.

First, most of the revenues in question in this case were paid by AT&T to petitioner between January, 1984, and May, 1984, under a private contract between the two companies which was not subject to tariff regulation. This was the period before the FCC-prescribed tariffs were implemented. If respondent's theory were correct, this Court would have to hold these revenues received under contract and not under tariff exempt from the gross receipts tax on that basis alone.

Second, even if these revenues had been paid under tariff rather than under contract, respondent's argument that tariff regulation determines taxability ignores the holding of the court in District of Columbia v. Chesapeake and Potomac Telephone Company, 179 F.2d 814 (D.C. Cir. 1950). In

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[3] The U.S. District Court opinion approving the AT&T divestiture agreement comments, in a footnote, that access charge revenues "substitute" for funds collected under the terminated Division of Revenue process. The context of that statement indicates that the "substitution" described was intended only in terms of a broad general financial impact on operating telephone company revenues. The footnote cannot be read as holding that the structure, regulatory status and tax treatment of access charges are identical to the pre-divestiture treatment of proceeds from the Division of Revenue process. United States v. AT&T, 552 F.Supp. at 196, n. 271.

that case, non-tariffed yellow pages directory advertising revenues were held to be subject to gross receipts tax.

In C&P, 325 F.2d at 217, the court gave consideration to the question of whether tariff or contract revenues were involved and concluded that the determinative test is whether the services which produced the revenues were used by another telecommunications carrier to provide services to its customers more efficiently and economically. Thus, applying that test to the facts in this case where petitioner provides services to the OCC's for the latter, in turn, to supply efficient and economical service to their own customers, the Court concludes that the revenues at issue here are not subject to the gross receipts tax, regardless of whether the services at issue are provided under tariff or by contract.

VI. Administrative Practice

A. Acceptance by District of Non-taxability

Despite all of the arguments and factors raised by respondent in support of taxation, the fact remains that since the date of their inception, revenues from access charges paid by all common carriers other than AT&T have been excluded by petitioner from gross receipts tax. Respondent contends it did not heretofore object to this exclusion because petitioner's method of accounting for its revenues was confusing and unclear so that respondent was unable to identify the revenue sources. The Court disagrees.

The facts establish that respondent's representatives were on notice and understood the tax treatment of these revenues. During a 1978 tax audit by respondent, petitioner advised respondent by letter that it was reporting network access revenues received from other telecommunications common carrier corpanies as non-taxable. See Letter from Robinson, C&P Staff Supervisor, State & Local Taxes to Lewis, Tax

Auditor, D.C. Property Assessment Division, Dept. of Finance and Revenue (Sept. 21, 1978), paras. 1(g), 2(b) and 3(b). Respondent took no action during this audit to adjust such tax treatment. Furthermore, respondent affirmatively recognized that these services are non-taxable by granting a refund for Tax Year 1979 when petitioner erroneously paid tax on such revenues.

Petitioner specifically reported and identified revenues as non-taxable on the monthly tax return forms it filed for January through June, 1984. The tax return forms prescribed by the respondent specified that revenues be itemized by account number. The Court is satisfied that petitioner met that requirement. The Court further notes that petitioner's records were also available for inspection and audit by respondent at all times.

B. Lack of Administrative or Legislative Change

In C&P, 325 F.2d at 222, n.6, the court observed that respondent, by administrative practice, had treated certain "reimbursing payments" (Account No. 524) as consistently non-taxable for a period of over 20 years. The Court held that:

> This long-continued administrative practice, reflecting agreement with the interpretation of the statute advanced by the taxpayer here, is entitled to substantial weight.

Id. This principle is equally applicable here. This Court concludes that a similar administrative practice was shown to have been established by respondent regarding network access revenues itemized by petitioner as Account No. 508. Accordingly, the Court accords substantial weight to this long-established practice in reaching its conclusion as to the non-taxability of the revenues here at issue.

Having determined that Congress did not envision in 1939 the sophisticated telecommunications system of today nor encompass the network access revenues within the 1939 Act, the Court cannot and will not now step in to enlarge the breadth of the gross receipts tax. Indeed, even since divestiture in January, 1984, there are ever present changes taking place in the telecommunications field. It is not the role of this Court to accomplish by judicial decision what respondent should have attempted through administrative or legislative channels.

Respondent cannot ignore its own implied, if not actual, long-standing recognition of the non-taxability of revenues received by petitioner from other telecommunications common carriers. It is well settled that when an administrative agency abandons its precedents and "decides to reverse its course, it must give notice that the standard is being changed" and give supporting rationale for its actions. 1880 Columbia Road, N.W., Tenant's Association v. District of Columbia Rental Accomodations Commissions, 400 A.2d 333, 338 (D.C. 1979), citing Boston Edison Co. v. Federal Power Commission, 557 F.2d 845, 849, cert. denied, 434 U.S. 956 (1977). The Court concludes respondent failed to take even the minimal procedural steps necessary to change its established administrative practice. See, e.g., District of Columbia v. Green, 310 A.2d 848 (D.C. 1973) (where the District's Department of Finance and Revenue implemented a change in its unpublished property assessment policies by increasing assessment ratios, and the court held such change required notice and hearing before such policies could be binding).

Further, respondent could have acted legislatively to attempt to tax petitioner's network access revenues. Despite the fact respondent was aware over a two-year period since the AT&T decision in 1982 that divestiture would take place by January 1, 1984, respondent made no efforts at legislative change.

Relying on established practice of non-taxation of its network access revenues, petitioner was financially unprepared for respondent's tax assessment. Had respondent given petitioner notice of the change in taxation, petitioner would have had the opportunity to reflect the impact of the taxes at issue in the rates petitioner charges for network access services. The Court concludes repsondent failed to take the necessary action to tax petitioner's revenues in a manner that is fundamentally fair.

VII.

Upon careful consideration and a thorough review of the entire record herein, the Court determines summary judgment for petitioner is appropriate. In their pleadings and the hearing in open court, both parties argue there is no dispute in material fact as to respondent's long-established policy exempting petitioner's network access revenues from taxation. Moreover, the Court finds the gross receipts taxing statute was not drafted to cover the subject revenues and the case law has interpreted the statute accordingly. Thus petitioner is entitled to judgment as a matter of law.[4]

Wherefore, it is this 15th day of July, 1985,

ORDERED that petitioner's Cross-Motion for Summary Judgment be, and hereby is, granted; and it is

FURTHER ORDERED that respondent's Cross-Motion for Summary Judgment be, and hereby is, denied; and it is

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4 Both parties raised at bearing and in their pleadings the issue of whether or not respondent had the authority to assess petitioner for penalty and interest on the taxes in qustion. In light of the Court's decision in favor of petitioner, the Court need not reach that issue.

FURTHER ORDERED that petitioner is entitled to a refund of all gross receipts taxes paid, together with penalty and interest; and it is

FURTHER ORDERED that petitioner shall submit a proposed order setting forth the amount of the refund within ten days of the signing of this Order.

JUDGE IRALINE G. BARNES

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